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July 17, 2015

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Room TW-A325  
Washington, D.C. 20554

Re: *Expanding the Economic and Innovation Opportunities of Spectrum Through  
Incentive Auctions*, GN Docket No. 12-268

*Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules  
for Digital Low Power Television and Television Translator Stations*,  
MB Docket No. 03-185

*Amendment of Parts 15, 73 and 74 of the Commission's Rules to Provide for the  
Preservation of One Vacant Channel in the UHF Television Band For Use By White  
Space Devices and Wireless Microphones*, MB Docket No. 15-146

Notice of *Ex Parte* Presentation

Dear Ms. Dortch:

In accordance with FCC Section 1.1206(b)(2) of the FCC's rules, this letter is submitted to notify you that on July 17, 2015, David J. Mallof, Principal of Free Access & Broadcast Telemedia, LLC ("Free Access" or "FAB"), and undersigned counsel met with Jessica Almond, Acting Legal Advisor for Engineering and Technology, Wireless, and Incentive Auction in the Office of FCC Chairman Tom Wheeler.

Topics discussed included FAB's requests that the Commission:



1. Release data describing the various impacts the incentive auction and repacking process will have on low power television (“LPTV”) stations. The Commission made a commitment in its January 8, 2015, *Order* denying FAB’s “Motion to Toll the Comment and Reply Comment Deadlines in the Third Notice of Proposed Rulemaking” to consider impacts to LPTV at a later date.<sup>1</sup> In its *Second Order on Reconsideration* (“*Second Order*”), released on June 19, 2015, the FCC stated it does not have any data regarding the impacts of the clearing and repacking process on LPTV stations.<sup>2</sup> If LPTV data had not been included in the analysis used in turn to generate the Greenhill 1 report issued on October 1, 2014, then LPTV licenses would have to have been treated as if they were non-existent. FAB asserts, however, that the Commission must have been aware of these impacts upon LPTV in order to be able to make findings about the final nationwide clearing of 126 MHz of spectrum and to generate, in turn, purchase prices for stations.<sup>3</sup>

The impacts on LPTV must be released now to enable interested parties to offer meaningful proposals on how to mitigate the auction’s harmful impact on LPTV licensees.<sup>4</sup> FAB will likely file a Freedom of Information request for such information and once the information is released, will ask the Commission to reopen comments in the *Third NPRM*. If a Report and Order in the *Third NPRM* were to be issued without giving interested parties

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<sup>1</sup> See *Order*, DA 15-31, released January 8, 2015, para. 7, available at: [https://apps.fcc.gov/edocs\\_public/attachmatch/DA-15-31A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DA-15-31A1.pdf). See also FAB’s *Motion to Toll*, dated December 22, 2014 submitted in three parts, available at: <http://apps.fcc.gov/ecfs/document/view?id=60001010739>, <http://apps.fcc.gov/ecfs/document/view?id=60001010740>, and <http://apps.fcc.gov/ecfs/document/view?id=60001010741>.

<sup>2</sup> *Second Order on Reconsideration* in docket 12-268, FCC 15-69 released June 19, 2015, footnote #548, available at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2015/db0619/FCC-15-69A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0619/FCC-15-69A1.pdf)

<sup>3</sup> The Greenhill 1 report, is available at <http://apps.fcc.gov/ecfs/document/view?id=60001012317>

<sup>4</sup> The Commission requested comments on “additional measures we should consider in order to mitigate the impact of the incentive auction on LPTV and TV translator stations and to help preserve the important services they provide.” *Third Notice of Proposed Rulemaking* FCC 14-151, released October 10, 2014 (“*Third NPRM*”), para. 59, available at <http://apps.fcc.gov/ecfs/document/view?id=60000976623>. The Commission also directed commenters to “...describe in detail any perceived benefits and disadvantages of the measures advocated.” *Id.*



the opportunity to review the data, the integrity and completeness of the rulemaking and the statutorily-required Initial Regulatory Flexibility Analysis (“IRFA”) and Final Regulatory Flexibility Analysis (“FRFA”), as mandated under the Regulatory Flexibility Act (“RFA”), will be compromised.<sup>5</sup>

2. Delay no further in providing Congress the requested LPTV impacts for a 126 MHz clearing scenario. A joint Congressional letter to the Government Accountability Office (“GAO”) dated October 1, 2014 from Representatives Anna Eshoo (CA) and Joe Barton (TX) underscores the importance of disclosing this information at the earliest possible time. The letter is dated the very same day the FCC released the Greenhill 1 report to the public in an effort to promote an auction.<sup>6</sup>
3. Release information compiled by the Commission concerning LPTV clearing and station extinguishment impacts regarding the 84 MHz clearing scenarios put together by Commission staff and cited -- but not disclosed -- by the IATF.
4. Acknowledge the errors and omissions with regard to LPTV rights that occurred during the drafting of the Spectrum Act. FAB discussed its concerns, outlined in its May 5, 2014 *ex parte*, with errors and omissions made during the analysis and drafting stages of the Spectrum Act that will severely impact the LPTV industry.<sup>7</sup>

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<sup>5</sup> The underlying spectrum clearing assumptions and outputs of the FCC analyses that gave rise to the financial representations contained in the Greenhill 1 report are central considerations to any further Commission action in this matter. FAB believes that such considerations were essential for reconsideration before the *Second Order* was issued – they are even of greater importance for the *Third NPRM* to conform to the FCC’s obligations under the RFA. In a meeting with the Incentive Auction Task Force (“IATF”) on May 21, 2015, FAB mentioned that adopting measures in the *Third NPRM* without release of the scope of the impacts on LPTV of clearing 126 MHz, reserving *a priori* an added “vacant” 6 MHz block for unlicensed services, and selling 100 MHz in the open market at highly specific price points for full-power and Class A stations in 210 market areas would undermine the rulemakings as well as the FRFAs.

<sup>6</sup> The joint Congressional letter is attached and also available at [http://joebarton.house.gov/uploads/LPTVletter\\_100114.pdf](http://joebarton.house.gov/uploads/LPTVletter_100114.pdf) (last visited July 14, 2015). FCC staff have acknowledged on several occasions to in various public fora that they are aware of the GAO letter, yet no information has been released. FAB noted the irony that the FCC could have released a full nine (9) months ago much of the LPTV impact data requested by Congress for clearing 126 MHz (and likely also for clearing 84 MHz), since those results were in hand on the very same day Congress wrote to the GAO.

<sup>7</sup> FAB presented Ms. Almond with a copy of its Written *Ex Parte* Comments filed on May 5, 2014, which provide an in-depth discussion of FAB’s concerns with the drafting of the Spectrum Act. A



5. Acknowledge that LPTV is not explicitly barred from participating in the auction under the language of the Spectrum Act. LPTV is mentioned only once in the Act in a passage stating there shall be no alteration of LPTV rights. It is significant that the FCC stated in the *First NPRM* that the Commission has the authority to include LPTV in the auction. FAB agrees.
6. Express concern with the apparent disregard by the FCC with regard to the survival of the LPTV industry. This proceeding involves “life or death” issues for LPTV stations. A court might well find that shutting down LPTV stations would be a “Taking without Just Compensation” in violation of the Fifth Amendment of the U.S. Constitution. FAB expressed a willingness to provide anecdotes, if desired by the Commissioner, of egregiously biased comments made by senior FCC staff concerning their indifference to adoption of measures to mitigate the impact of the auction on LPTV stations. FAB questions whether the adoption of rules by the FCC that disregard the rights of LPTV stations would pass court muster.

Points made in the presentation are more fully set forth in FAB’s submissions filed in Dockets 12-268 and 03-185.

Respectfully submitted,

/s/

Colin Black Andrews  
Counsel to Free Access & Broadcast Telemedia, LLC

cc: Jessica Almond (via email to Jessica.Almond@fcc.gov)  
Gary Epstein (via email to Gary.Epstein@fcc.gov)  
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James W. Wiley, III (via email to James.Wiley@fcc.gov)  
Claudia Rodgers, Acting Chief Counsel for Advocacy, United States Small Business Administration (via email to: Claudia.Rodgers@sba.gov )

Attachments: Letter from Representatives Eshoo and Barton to the GAO, October 1, 2014.  
Written *Ex Parte* Comments submitted in Docket 12-268 on May 5, 2014.

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copy of those comments is attached and available at  
<http://apps.fcc.gov/ecfs/document/view?id=7521107089>.

# Congress of the United States

Washington, DC 20515

October 1, 2014

The Honorable Gene L. Dodaro  
Comptroller General of the United States  
U.S. Government Accountability Office  
441 G Street, N.W.  
Washington, D.C. 20548

Dear Mr. Dodaro,

The Middle Class Tax Relief and Job Creation Act of 2012 became law in February 2012. This law directs the Federal Communications Commission (FCC) to conduct an incentive auction allowing a broadcaster to voluntarily relinquish some or all of their spectrum usage rights in return for compensation (better known as the “reverse auction”).<sup>1</sup> The law also requires the FCC to hold a “forward auction” allowing wireless carriers to bid on the available cleared spectrum.<sup>2</sup> Only full-power broadcasters and low-power broadcasters with a Class A license are able to participate in the reverse auction.

In May 2014, the FCC adopted an Incentive Auction Report and Order addressing important issues related to the incentive auction.<sup>3</sup> The FCC also announced that the agency is planning to initiate a future Low-Power Television station (LPTV) and TV Translator station proceeding to consider measures that help alleviate the impact of LPTV and TV Translators during the incentive auction.

While we are thankful for the ongoing efforts of the FCC, we ask the Government Accountability Office (GAO) to study the impacts of the incentive auction on LPTV stations and TV Translator stations, as well as their viewers. Consistent with the FCC’s Report and Order, we ask that the GAO evaluate the impact of the incentive auction for each of the two potential scenarios for repurposing broadcast spectrum: (a) 84 megahertz and (b) 126 megahertz. Within each of the two categories, please provide the following information:

1. The total number of LPTV stations that provide original programming or broadcast local news and information, especially those serving racial and ethnic minority communities;
2. The total number of TV translator stations that rebroadcast local news and information programming of a full-power TV broadcast station;
3. A projection of the number of LPTV stations and TV translator stations listed under (1) and (2) that may lose either their current input or output channel as a result of the forward auction;

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<sup>1</sup> Middle Class Tax Relief and Job Creation Act of 2012, 26 U.S.C. §6403 (2012).

<sup>2</sup> *Id.*

<sup>3</sup> Federal Communications Commission. (2014). FCC adopts rules for first ever incentive auction; will make available additional airwaves, increase competition for mobile broadband [Press Release]. Retrieved from [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-327100A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-327100A1.pdf)



4. A projection of the number of such LPTV stations and TV translator stations that will subsequently be able to locate and operate on replacement channels after the auction, together with an aggregate estimate of the costs of relocation, including new equipment, legal and engineering services, and facility construction;
5. A projection of the number of such LPTV stations and TV translator stations that will be unable to locate to or operate on replacement channels after the auction;
6. A projection of the number of viewers that will lose over-the-air access to at least one such local LPTV station that provide local news and information, especially to underserved communities of interest;
7. A projection of the number of viewers that will lose over-the-air access via such TV translator stations to at least one of the signals of the regional affiliates of the major commercial or noncommercial educational television broadcast networks; and
8. Recommendations to the FCC and Congress on ways to remedy adverse impacts of the auction on LPTV stations and TV translator stations, and, most importantly, their viewers.

Thank you for your timely attention to this request. If you have any questions, please contact Emmanuel Guillory (Rep. Joe Barton) at 202-225-2002 or David Grossman (Rep. Anna Eshoo) at 202-225-8104.

Sincerely,



Joe Barton  
Chairman Emeritus  
House Committee on Energy and Commerce



Anna G. Eshoo  
Ranking Member  
Subcommittee on Communications  
& Technology

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	
	)	
Expanding the Economic and Innovation	)	Docket No. 12-268
Opportunities of Spectrum through Incentive	)	
Auctions	)	

To: The Commission

**WRITTEN *EX PARTE* COMMENTS**  
**OF FREE ACCESS & BROADCAST TELEMEDIA, LLC<sup>1</sup>**

Free Access & Broadcast Telemedia, LLC (“FAB”), by counsel, hereby respectfully submits these Written *Ex Parte* Comments in the above-captioned proceeding.<sup>2</sup> FAB urges the Federal Communications Commission (“FCC” or “Commission”) to make sure it has conducted the required, robust, quantitative, and financial analysis on the benefits of including LPTV in the incentive auction, which it can do using its existing authority and independent agency discretion, as other commenting parties have requested.<sup>3</sup> In the Spectrum Act, Congress required the FCC to conduct a reverse auction to determine how much to compensate full power and Class A low power

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<sup>1</sup> Topics covered in these comments will be the subject of discussion as part of an *ex parte* meeting FAB has scheduled for May 6, 2014 with FCC decisionmaking personnel. These comments are in response to public statements clarifying FCC proposals regarding LPTV stations set forth in the Transcript from the recent 2014 LPTV NAB Show Info-Session with FCC Media Bureau Chief William T. Lake, April 7, 2014, at p. 2 (3<sup>rd</sup> paragraph), p. 8 (last paragraph) & p. 15 (4<sup>th</sup> paragraph), which was filed in Docket 12-268 on April 22, 2014, by the LPTV Spectrum Rights Coalition (“Transcript”), to which FAB has not had a prior opportunity to reply. To the extent that these comments are otherwise deemed to be late-filed, FAB respectfully requests a waiver of the official filing deadline so that the Commission can consider these comments. As set forth herein, the FCC can avoid committing egregious errors by undertaking the analysis suggested by FAB. Acceptance of these comments, therefore, would serve the public interest.

<sup>2</sup> FAB previously commented in support of the future of low power television stations (“LPTV”) despite an auction policy proposal apparently designed to eliminate many longstanding and legitimate broadcast licensees out of the 600MHz band. FAB is committed to providing America’s substantial number of local, underserved, and often overlooked consumers with residential and mobile services, both video and interactive, for free.

<sup>3</sup> See, generally, Transcript cited in n. 1, *supra*. See also Comments of Mike Gravino, filed March 12, 2013, at p. 2; Reply Comments of Civic Media Advisors, filed May 20, 2013, at p. 10; Ex Parte Comments of LPTV Spectrum Rights Coalition, filed August 27, 2013, Summary p. 3; LPTV Spectrum Rights Coalition – Spectrum Auction Task Force Presentation on March 18, 2014, filed in Docket 12-268 on March 21, 2014, points 4 and 5 at pp. 4-6.

TV station licensees for voluntarily relinquishing their spectrum usage rights. Full power and Class A low power TV stations were also given special considerations applicable to relocation costs or the option of future regulatory flexibility by foregoing reimbursement for relocation. Even though the Commission is not required to include LPTV licensees in the incentive auction, *Congress did not limit the FCC's discretion to include LPTV participation in the auction.*

**I. The FCC has the authority to include LPTV in the reverse auction.**

The Commission itself explicitly confirmed its authority to include LPTV licensees in the incentive auction when it presented its Initial Regulatory Flexibility Act Analysis appended to the *Notice of Proposed Rulemaking* in the above-captioned proceeding, Appendix B, at pages 183-84, paragraph 71 (emphasis added):

The proposal to limit reverse auction participation to only full power and Class A stations and to not permit participation by low power television stations will have a greater impact on small entities since all low power television stations are small entities. Alternatively, the *Commission could allow low power television stations to participate in the reverse auction* but this would have *no practical use* since low power television stations do not have to be protected in repacking and clearing them from their channels in the reverse auction would be unnecessary. The Commission believes the additional burden on low power stations is outweighed by the need to implement Spectrum Act provisions, to recover a sufficient amount of spectrum in the reverse auction and to complete the successful repacking full power and Class A stations.

Having acknowledged its authority to “allow LPTV stations to participate in the reverse auction,”<sup>4</sup> the Commission may not now assume there is “no practical use” to include LPTV in the reverse

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<sup>4</sup> The *National Broadband Plan* recommended that the FCC “authorize LPTV stations to participate in incentive auctions.” *National Broadband Plan*, Chapter 5.8.5, point 5, p. 92, available at <http://download.broadband.gov/plan/national-broadband-plan-chapter-5-spectrum.pdf> (last visited May 4, 2014). In addition, FCC’s *National Broadband Plan* stated that the FCC can add an “overlay auction” if warranted (Chapter 5, Section 5.8.5, point 4), thus acknowledging its authority to conduct auctions creatively to alleviate the anticipated spectrum crunch even before the Spectrum Act subsequently became law. Thomas Hazlett, an endowed chair professor at Clemson University as well as a professor at George Mason University, who is well known to the FCC as a spectrum and telecommunications economist, advocated that LPTV should be included for auction participation in his proposed overlay auction approach for the 600 MHz band. “Comment submitted by Thomas W. Hazlett,” GN Docket 09-51, December 18, 2009, p. 15. Chapter 5.8.5 point 4 of the *National Broadband Plan* essentially found that his approach would be a kind of “Plan B” for the FCC to pursue if an incentive auction failed. Early on, the FCC found in Section 5.4 of the



auction without developing a record for that conclusion. The Commission cannot merely dismiss the question of LPTV participation without conducting a substantive, quantitative analysis. The Regulatory Flexibility Act<sup>5</sup> requires that the FCC make that analysis before it adopts rules in order to examine their impact on small businesses such as LPTV operators and to consider less burdensome alternatives.

## **II. The FCC must consider benefits-costs of including LPTV in the reverse auction.**

If ever the Commission had the opportunity to evaluate the financial and policy tradeoffs and benefit-cost of various approaches and scenarios that could enhance the auction results while avoiding trampling LPTV incumbents' rights, then truly this it is. By doing so, FAB submits the Commission will discover that the least costly, most cost-efficient and least burdensome alternative to wiping out small business owners operating LPTV businesses in major markets will be to include them in the reverse auction.

FAB urges the Commission to provide its findings in the Report and Order. The Commission needs to evaluate these outcomes and disclose its analysis in terms of spectrum cleared versus net revenue and debt reduction. Specifically, the analysis should cover three areas of study if LPTV licensees were invited to the auction versus their exclusion:

- 1) the total MHz and total MHz-pops that could be cleared;
- 2) the relocation cost savings to LPTV licensees and time-to-market savings to the government; and
- 3) the net revenue to the US Treasury.

If LPTV licensees are encouraged to participate in the reverse auction, FAB believes many would decide to contribute their spectrum rather than risk the potential for extinction after the

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*National Broadband Plan* a general pressure to clear spectrum as quickly as possible. Such spectrum clearing must not be achieved on the backs of LPTV licensees, however, as though they have no legitimate spectrum rights.

<sup>5</sup> 5 U.S.C. Sec. 601, *et. seq.*

repacking. More post-auction spectrum would also be available for the forward auction and future unlicensed and licensed use. Because LPTV stations have the right to file displacement applications, the spectrum used by LPTV stations after the repacking will be unavailable to other wireless operators expecting to launch unlicensed services in TV white spaces. If LPTV participates in the auction, however, the demand for displacement channels will not be as high, and those LPTV operators desperate to continue broadcasting their diverse, often religious, ethnic, and community programming would have greater potential to remain on-air serving the public.

Commission officials and others recently have suggested that some of the financial objectives included in the Spectrum Act may be met without reliance on the proceeds from the 600 MHz auction. For instance, FirstNet funding to create a nationwide public safety network apparently can be funded from receipts from the recent H Block auction, the newly-created AWS-3 auction, and the 1695 Band. Thus, for this auction, the Commission should be free to focus on total spectrum cleared (not just paired blocks auctioned off for the big four oligopoly carriers but total spectrum for all applications and all technologies, including licensed and unlicensed use), as well as relocation costs, and the net debt reduction contributed to the US Treasury. FAB urges the Commission to include these considerations, and clearly state the policy priorities and tradeoffs in its quantified analysis of the benefits of including LPTV in the reverse auction. FAB has observed scant consideration thus far by the FCC for the financial and policy tradeoffs – with or without LPTV auction participation – between total spectrum cleared for this generational, “once in a lifetime” opportunity before it, and debt reduction possible now that funding for FirstNet appears to be assured.

FAB submits that any combination of just two of the three following possible benefits of LPTV auction participation is sufficient for the FCC to find the public interest, convenience, and necessity will be best served by including LPTV in the reverse auction:

- 1. Would more total spectrum be cleared for sale in the forward auction for licensed use, white space use, or both, by including LPTV in the auction?**
- 2. Would band clearing by the FCC, enabling the forward auction of mobile licenses, be achieved more expeditiously by including LPTV licensees in the reverse auction?**
- 3. Would total net revenue after the forward auction concludes be nearly the same or higher to the US Government if LPTV is included in the reverse auction?**

These are not questions an entrepreneurial firm such as FAB can answer. But given the FCC's resources, the authority it has to include LPTV in the reverse auction, and its stewardship over tens of billions of dollars-worth of spectrum in question, versus the many thousands of adversely affected LPTV and translator licensees, FAB submits a robust analysis is required in order to avoid making an arbitrary and capricious decision.

FAB believes that the FCC needs to describe the supply and demand curves for this spectrum band, taking into account all relevant policy choices, including a decision to include or exclude LPTV licensees from the reverse auction. That analysis will allow all public stakeholders to see just how answering the three questions above may look as a matter of public telecommunications and debt reduction policy. FAB's view is that after those questions are examined, a decision to include LPTV is a winner for all licensees equitably under the law, for the US Government's coffers, for spectrum clearing for a generation, and for American wireless consumers.

### **III. Inclusion of LPTV in the auction is consistent with the Spectrum Act.**

In recent public appearances, some Commission officials appear to be avoiding the conclusion in the NPRM's Initial Regulatory Flexibility Act Analysis, paragraph 71, that the FCC has authority to include LPTV in the auctions. Instead, they comment that the Spectrum Act somehow does not allow independent FCC thinking on the matter. This is not true. Although Congress specifically incentivized full power TV and low power Class A stations for special treatment for reimbursement of relocation costs, Congress did not limit the FCC's existing authority or expert discretion to allow LPTV participation in the reverse auction.

Indeed, Section 6403(b)(5) of the Spectrum Act is explicit that in implementing the statute, the Commission must not alter the existing incumbent spectrum usage rights of LPTV stations. Congress specifically stated, notwithstanding anything else in the Spectrum Act, that:

***LOW-POWER TELEVISION USAGE RIGHTS. — Nothing in this subsection shall be construed to alter the spectrum usage rights of low-power television stations.***

The plain language of the statute is that the Commission may not alter the rights of existing LPTV stations to use their licensed spectrum. Thus, even though the Commission is not required by Congress to include LPTV in the reverse auction or to allow LPTV to receive reimbursement of their expenses in changing channels in the repacking, Congress intended that they survive the reorganization of the television band. The FCC can still exercise its discretion to invite LPTV to the auction if the benefits of inclusion outweigh the costs of exclusion.

### **IV. The FCC must exercise its own independent judgment in adopting auction rules.**

In adopting the reverse auction rules, the FCC cannot refuse to exercise its independent judgment to interpret the Spectrum Act in a way that reconciles preferences for TV stations and Class A TV stations while not altering LPTV spectrum usage rights. FAB notes that the Court of

Appeals for the District of Columbia Circuit and Federal District Court have highlighted the need for agencies to engage in rigorous benefit-cost analysis and found that the agency's action was arbitrary and capricious when the agency failed to apprise itself of the economic consequences of its regulations, or to exercise its own independent judgment. This is particularly true when the law or Congressional intent or both are potentially in conflict, and the public interest can be better served by taking such inclusionary action, especially where potentially greater equities can be achieved for all affected parties. *See, e.g., Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011); *American Petroleum Institute v. SEC*, Civil Action No. 12-1668, slip op. at 9, 22, 25-26 (D.D.C. July 2, 2013). “[A]n agency regulation must be declared invalid, even though the agency might be able to adopt the regulation in the exercise of its discretion, if it was not based on the agency’s own judgment but rather on the unjustified assumption that it was Congress’ judgment that such a regulation is desirable or required.” *Arizona v. Thompson*, 281 F.3d 248, 259 (D.C. Cir. 2002).

Congress would have had no reason to include Section 6403(b)(5) of the Spectrum Act regarding no alteration of LPTV spectrum usage rights if it did not want to preserve LPTV service. The Commission’s recent view that LPTV stations are secondary to *everyone* flies in the face of the expectations of LPTV licensees who created their small businesses with the understanding that their risks of displacement would be limited solely to other full service TV stations and land mobile radio stations operating on Channels 14 – 20, when the TV band ranged from channels 2 to 68. *Low Power Television Service*, 53 RR2d 1267, 1269 (1983). Congress did not sentence LPTV to extinction when it stated that their spectrum usage rights shall not be altered by the Spectrum Act. Had that been the intent, Congress could have clearly stated that LPTV’s use of spectrum shall not be protected in the reverse auction or repacking of the TV band. It did not declare that intent.



**V. Congress failed to conduct proper benefit-cost analysis of impact on LPTV.**

Regarding the actual passage of the Spectrum Act, FAB has ascertained after multiple discussions with members of the Congressional Budget Office (“CBO”) and others that the FCC, Congressional committee staff in both chambers and on both sides of the aisle, and the CBO, in their haste to draft the legislation, erred twice. On the revenue side, CBO was apparently informed by the FCC and Congressional staff that LPTV as secondary had no rights whatsoever and therefore should not be included in any of the auction revenue scenarios. A second harmful error occurred when Congressional staff did not properly follow Congress’ own Unfunded Mandate Reform Act of 1995 (UMRA) in estimating and disclosing the massive unfunded private mandate LPTV faces in relocation costs – a set of costs no different whatsoever from the relocation costs faced by full power and Class A low power stations that may need to move. Based on using flawed inputs – on an overly myopic view of LPTV license usage rights, and then applying asymmetric logic on whether a new mandate was being created for full power and Class A low power TV stations, but not for LPTV – CBO wrongly excluded LPTV from consideration on the entire cost side analysis in its Cost Estimate report for S.911. This blatant inconsistency and omission affects thousands of LPTV and translator licensees to the tune of over \$1.0 billion, based on one estimate filed by the LPTV Spectrum Rights Coalition in this proceeding. FAB believes these unfunded mandate costs for LPTV are up to 50% percent higher than the cost assumptions in S.911 for full service and Class A stations, amounting to a \$1.5 billion unfunded mandate imposed on private sector LPTV licensees that must not continue to fail to be acknowledged and examined substantively in the benefit-cost analysis in the Report and Order.

FAB combines the dual revenue side and cost side estimate failures here because the FCC must independently consider both in its benefit-cost analysis of why certain rules are being adopted,

including the question of whether to invite LPTV to the auction. The FCC may not look the other way and “blame” Congress for these inconsistencies and omissions. Just because the Senate Committee somehow did not catch – or unintentionally contributed to – these twin oversights does not mean the FCC may overlook them now.

As additional clarification, the official CBO Cost Estimate for S.911 was rolled into the official CBO Cost Estimate basis for the Spectrum Act. The only addendum and update for the Spectrum Act was a mere, macro, two-page supplement to the prior S.911 analysis for inclusion into H.R. 3630 for the 112th Congress. This is apparently common where bills come together and evolve into final legislation. CBO specifically did not consider the impact of the explicit, late-added Congressional admonition that the entire Spectrum Act shall not alter LPTV spectrum usage rights. This was a major, regrettable oversight for the Senate and House Committees, and for the CBO, in order to push passage of the Spectrum Act in the much larger bill for Middle Class Tax Relief. If the FCC does not use its own independent agency judgment to clarify and rectify these inconsistencies and omissions, exclusion of LPTV from the auction will cause damage to thousands of licensees with tragic results for these many small businesses.

## **VI. Conclusion**

The public interest would be best served by allowing LPTV licensees to participate on the revenue side of the reverse auction. As it is, they will not be reimbursed for relocating, or made whole if they are permanently displaced. The Commission’s Order needs to step up to these issues substantively with rigorous analysis.

After repacking full service and Class A TV stations, there is a looming shortage of relocation opportunities expected for LPTV in the 600 MHz band. By contrast, following the 700 MHz auction, ample spectrum relocation opportunities remained to move nearly all LPTV

incumbent licensees into the “new core” channels. In this new 600MHz proceeding of “musical spectrum chairs,” the opportunity for everyone to move again will not exist, and thus a likely dramatic regulatory taking is looming if the FCC does not undertake the benefit-cost analysis which FAB submits will support inclusion of LPTV in the reverse auction. Allowing LPTV into the auction is the seamless way to clear the maximum amount of spectrum expeditiously.

FAB looks forward to reviewing the FCC’s analysis of the benefit-cost of including LPTV and minimizing the harmful unfunded private mandate thrust upon thousands of legitimate, bona fide licensees. As it is, they will not be reimbursed for relocating. Nor does there appear to be any intention of making them whole if they are permanently displaced. If the FCC does not release this analysis in the Report and Order, then the only other alternative must be to include these questions explicitly in the new follow-on, LPTV-specific rulemaking which the FCC staff has indicated will likely be launched concurrently with the Report and Order.

FAB asks the Commission to uphold the legitimate incumbent license rights of thousands of community-based broadcasters nationwide – rights which Congress said shall not be altered in the Spectrum Act. FAB respectfully asks the FCC to consider the most free-market and inclusionary approach to treating all broadcast licensees equitably by allowing LPTV and translators in the auction.

Respectfully submitted

**FREE ACCESS & BROADCAST TELEMEDIA,  
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